No. 80-585

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MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LESTER THOMAS MAYNE, JR.,

Petitioner,

v.

STATE OF MARYLAND

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari to review the judgment of the Court of Appeals of Maryland is timely filed?

2. Whether the Court of Special Appeals of Maryland correctly decided that the trial court properly denied the motion to dismiss the indictment charging Petitioner with second degree murder?

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PRELIMINARY COMMENT

This Brief in Opposition to petition for writ of certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On May 7, 1980, the Court of Special Appeals of Maryland affirmed Petitioner's conviction of obstruction of justice in Case No. 890 and remanded Case No. 930 for trial on charges of second degree murder and battery. *Mayne v. State*, 45 Md. App. 483 (1980). On July 3, 1980, the Court of Appeals of Maryland filed an order denying the petition of Mayne for a writ of certiorari. From that order, as well as the reported opinion of the Court of Special Appeals, the Petitioner has applied to this Honorable Court for a writ of certiorari.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner contends that Amendment V of the United States Constitution is involved.

STATEMENT OF THE CASE

Petitioner was indicted in a seven count indictment in the Circuit Court for Kent County charging: (1) murder in the first degree; (2) murder in the second degree; (3) manslaughter; (4) assault with intent to murder; (5) assault and battery; (6) making a false statement to the police; and (7) attempted obstruction of justice. At the conclusion of evidence, Counts One, Two, Five (as to battery), and Seven were submitted to the jury. Following approximately eight hours of deliberation, the jury advised the trial court that it had reached a verdict on Counts One (first degree murder) and Seven (obstruction of justice),

but was deadlocked on Counts Two (second degree murder) and Five (battery). The trial court then decided to take a partial verdict with respect to Counts One and Seven, as prescribed by Maryland Rule 759d.[1] The following occurred when the jury returned it verdict:

> "(The Court): Gentlemen, we have received another note, which we have read to you in Chambers. 'We may have misled you, we have reached a verdict on Counts one and seven, but are deadlocked on Count two and fear we can not come to a unanimous decision.'
>
> * * * * * *
>
> (The Court) It is the Court's ruling that we have instructed them that they can rule on Count seven no matter how they have ruled on the previous Counts, guilty or not guilty. We therefore, will take a partial verdict on the first and seventh Counts.
>
> * * * * * *
>
> (The Clerk) Lester Thomas Mayne, Jr., please stand and raise your right hand.
>
> Ladies and Gentlemen of the jury, look upon the defendant at the bar. What say you, Mr. Foreman, do you find the defendant guilty or not guilty of the matter whereof he stands charged on Count one, to wit, murder in the first degree?
>
> (The Foreman) Not guilty.
>
> (The Clerk) What say you, Mr. Foreman, do you find the defendant guilty or not guilty on Count number seven, to wit, attempt to obstruct justice?
>
> (The Foreman) Guilty.
>
> (The Court) Now, Mr. Foreman, do we understand from your notes that you are unable to come to a verdict on Counts two and five, is that correct?
>
> (Mr. Foreman) That is correct, Sir."

[1] Maryland Rule 759d provides:

> "When there are two or more counts, the jury at any time may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree, may be tried again."

Following the taking of verdicts on Counts One (first degree murder) and Seven (obstruction of justice), the jury was excused. The State then asked the Court whether there was naything officially in the record with respect to a mistrial on Counts Two (second degree murder) and Five (battery). A mistrial was officially declared as to Counts Two and Five. Thereafter, Petitioner received a five year sentence for attempted obstruction of justice. The case was then removed to the Circuit Court for Cecil County, where Petitioner moved to dismiss Counts Two and Five on the basis of double jeopardy. The motion was denied. On an interlocutory appeal to the Maryland Court of Special Appeals, Petitioner argued, *inter alia,* that the denial of his motion to dismiss by the Circuit Court for Cecil County was improper.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND IS NOT TIMELY FILED.

Rule 20.1 of the *Rules of the Supreme Court of the United States* provides that "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort . . . shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." Rule 20.4 provides that "The time for filing a petition for writ of certiorari runs from the date the judgment . . . sought to be reviewed is rendered." The order of the Court of Appeals of Maryland denying the Peitioner's writ of certiorari in that Court issued on July 3, 1980. *See* Appendix to Petition at 1a. The petition docket of this Court shows that the instant petition was filed on September 24, 1980, beyond the 60 day period prescribed by Rule 20.1. The petition was not timely filed and should not therefore be considered by this Honorable Court.

II.

THE COURT OF SPECIAL APPEALS OF MARYLAND CORRECTLY DECIDED THAT THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS THE INDICTMENT CHARGING PETITIONER WITH SECOND DEGREE MURDER.

Petitioner contends that principles of double jeopardy prohibit his retrial on the charge of second degree murder. He argues first that the prior acquittal of him on the charge of first degree murder was tantamount to an acquittal of the second degree murder charge, thus barring a second prosecution for second degree murder. Alternatively, he argues that retrial should not be permitted because the trial judge did not declare a mistrial until after the jury had been discharged. The Court of Special Appeals rejected each of these contentions. With respect to Petitioner's initial contention, the Court of Special Appeals held that a retrial on the second degree murder charge is not barred by double jeopardy because there was no acquittal as to murder in the second degree, there being ". . . no determination of any ultimate fact that would require the [Petitioner's] acquittal of second degree murder." *Mayne v. State,* 45 Md. App. at 487, 488. In the opinion of the Court of Special Appeals, Petitioner's second contention lacked both supporting authority and logic as well, since the mistrial in this case occurred the moment the trial court, on its own motion pursuant to Maryland Rule 759d, took a partial verdict on Counts One and Seven, following the jury's inability to reach a verdict on Counts Two and Five. The trial court's mere failure to declare formally the fact of the mistrial in the jury's presence did not, therefore, render the mistrial illegal. Each of these issues was properly decided by the Court of Special Appeals of Maryland.

In Maryland, the common law offense of murder still obtains, and the term "murder" as used in Maryland criminal statutes is one "recognized as a general de-

nomination including offenses differing from each other in degree of atrocity, but not in their nature and kind . . . the measure of punishment only is sought to be graduated according to the circumstances under which it was committed." *Davis v. State,* 39 Md. 353, 374 (1874). See also *Smith v. State,* 41 Md. App. 277, 294 (1979). Maryland Code, Article 27, § 407 provides, *inter alia,* that all murder "prepetrated . . . by any kind of willful, deliberate and premeditated killing should be murder in the first degree." Maryland Code, Article 27, § 411 provides that "all other kinds of murder shall be deemed murder in the second degree." In this case, the indictment charged Petitioner separatedly with first degree murder in Count One and with second degree murder in Count Two.[2] In pertinent part Count One charged that Petitoner ". . . on or about August 9, 1978 in [Kent County, Maryland] unlawfully, wilfully and of deliberately premeditated malice aforethought, did kill and murder Valerie Ann Mayne . . ." Count Two in pertinent part charged that Petitioner ". . . unlawfully with malice aforethought, did kill and murder Valerie Anne Mayne . . ." It follows logically, that where, as here, the charges of first and second degree murder are separately charged and submitted to the jury, an acquittal on the first degree murder charge means only that the murder was not accomplished "by any kind of wilful, deliberate and premeditated killing". Such an acquittal does not mean, however, that the killing was not murder. See *Rasnick v. State,* 7 Md. App. 564, 571 (1969). The Court of Special Appeals was thus correct in holding

[2] In Maryland it is not necessary to charge a person separately for first and second degree murder. Md. Code, Art. 27, § 616 provides the statutory form of indictment for murder as follows:

> "That A.B. on the ___ day of _____, at the County aforesaid feloniously (wilfully and of deliberately premeditated malice aforethought) did kill (and murder) C.D. . . ."

Under this form of indictment an accused may be found guilty of murder in the first degree, murder in the second degree or manslaughter. *Carrol v. Warden,* 205 Md. 631 (1954).

that the defense of former jeopardy did not bar a retrial on the second degree murder charge. This decision comports with this Court's recent exegesis of double jeopardy jurispurdence, which recognizes that the common law plea of *autrefois acquit* is at the core of the protections afforded by the double jeopardy clause. Only when the jury's verdict or the trial court's ruling "actually represents a resolution [in the defendant's favor] correct or not of some or all of the factual elements of the offense charged, can a defendant successfully plead former jeopardy." *United States v. Martin Linen Supply Company*, 430 U.S. 564, 571 (1977). See also *United States v. Wilson*, 420 U.S. 332 (1975) and *United States v. Scott*, ___ U.S. ___, 98 S. Ct. 2187 (1978). Here, the jury's acquittal of Petitioner on the first degree murder charge represents a finding in Petitioner's favor that he did not premeditate the murder. Whether or not a murder was committed could not, however, be resolved by the jury. This legal fact is fatal to Petitioner's double jeopardy claim.

Nor can Petitioner derive succor from this Court's decision in *Green v. United States*, 355 U.S. 184 (1957), where the jury had submitted to it charges of first degree murder and second degree murder. It returned a verdict of guilty of murder in the second degree but was silent as to the first degree murder charge. This Court held that the jury's silence on the first degree murder charge operated as an "implicit acquittal" of that offense, which barred a reprosecution of the first degree murder charge. It is readily apparent that this case is factually and doctrinally distinguishable from *Green*. Significant in *Green* was this Court's finding that there was no manifest necessity to declare a mistrial on the first degree murder charge, since there was not even an inquiry to the jurors as to whether they were unable to reach a verdict on that charge. Similarly, in *State Ex Rel. Robinson v. Blackburn*, 367 So. 2d 360 (La. 1979), a case relied upon by Petitioner, the

trial court directed a verdict of acquittal on the charge of first degree murder on the grounds that the State had failed to adduce sufficient evidence. Following this and before the jury was discharged the State amended the indictment to charge second degree murder and the defendant pleaded guilty to this charge. Since the original indictment did not charge second degree murder the Supreme Court of Louisiana reasoned that the acquittal of first degree murder served to acquit the defendant of second degree murder, a lesser included offense. This decision was primarily decided on the basis of La. Code of Criminal Procedure, Art. 596(1) which provided:

> "Double jeopardy exists in a second trial only when the charge in that trial is (1) identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial."

Here, as noted, the Petitioner was charged separately with first and second degree murder and each charge was submitted to the jury. The jury deliberated for a period of approximately eight hours and was unable to reach a verdict on Counts Two (second degree murder) and Five (battery), advising the trial court that it was "hopelessly deadlocked". In these circumstances, the trial court did not abuse its discretion in taking a partial verdict, as expressly provided in Md. Rule 759d. Indeed these circumstances constitute the *sine qua non* of classic manifest necessity under *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824). Accordingly, Petitioner may again be put upon to defend the second degree murder charge without contravening the double jeopardy clause.

Petitioner alternatively argues that this Court should review this case to set "perameters [sic] or guidelines indicating when a mistrial is officially declared and when the taking of a partial verdict represents the final action

on a charging document." (Petition at page 3). According to Petitioner, the mistrial in his case was illegal because it was not officially declared until after the jury was dismissed. The Court of Special Appeals, in deciding this issue, held pursuant to Maryland Rule 759d, that where two or more counts are to be decided by the jury, a partial verdict may be returned as to the counts upon which the jury has agreed; any counts as to which the jury cannot agree may be tried again. The acceptance of the partial verdict pursuant to Maryland Rule 759d is thus tantamount to the declaration of a mistrial; therefore, in the opinion of the Court of Special Appeals, the formal declaration of a mistrial was "entirely superfluous". *Mayne v. State,* 45 Md. App. at 487. Respondent submits that this holding is correct. The operative fact causing the mistrial in this case was the jury's failure to agree upon a verdict on Counts Two and Five. In *United States v. Perez,* 22 U.S. at 528, this Court made plain that a jury's inability to reach a verdict constitutes the requisite manifest necessity for a mistrial. This concept is well-defined in the law. See *e.g. Wade v. Hunter,* 336 U.S. 684 (1949); *Simmons v. United States,* 142 U.S. 148 (1891); and *Arizona v. Washington,* 434 U.S. 497 (1978). It is likewise well-settled that where a jury renders a partial verdict on an indictment containing more than one count, a defendant may be retried on the counts upon which the jury was unable to agree. *Selvester v. United States,* 170 U.S. 262 (1898). Maryland Rule 759d merely codifies each of these well-settled principles. Quite clearly then, the circumstances which may give rise to a mistrial in criminal cases involving a jury's inability to reach a verdict on all counts of an indictment, are well-defined in the law, and a further explication thereof by this Honorable Court is not warranted.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should be denied.

Respectfully submitted,

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